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No. 455

In the Supreme Court of the United States

OCTOBER TERM, 1961

CURTIS ALLEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The letter opinion and the findings of fact and conclusions of law of the district court (R. 28–38) are unreported. The majority and concurring opinions in the court of appeals (Pet. 15–19) are reported at 293 F. 2d 916.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1961 (Pet. 19–20). A petition for rehearing was denied on August 22, 1961, except that the directions to dismiss the complaint were modified so as to provide for further proceedings in the district

court (Pet. 20).[1] The petition for a writ of certiorari was filed on September 28, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, for federal estate tax purposes, a decedent can avoid the inclusion in her gross estate of property supporting a reserved life estate by selling the life estate in contemplation of death.

STATUTE INVOLVED

Section 811 of the Internal Revenue Code of 1939, 26 U.S.C. 811 (1952 ed.), provides in pertinent part as follows:

> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> * * * * *
>
> (c) [as amended by Sec. 7(a) of the Technical Changes Act of 1949, 63 Stat. 891; Sec. 501 (b) of the Revenue Act of 1950, 64 Stat. 906; and Sec. 207(a) of the Technical Changes Act of 1953, 67 Stat. 615] *Transfers in Contemplation of, or Taking Effect at, Death.*—
>
> (1) *General Rule.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—
>
> (A) in contemplation of his death; or
>
> (B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; * * *
>
> * * * * *
>
> Subparagraph (B) shall not apply to a transfer made before March 4, 1931, nor shall subparagraph (B) apply to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516).
>
> * * * * *

[1] The purpose of the remand was to determine the amount of credit allowable under Section 813(b) of the 1939 Internal Revenue Code for payment of Colorado state inheritance taxes.

STATEMENT

The decedent, Maria McKean Allen, was born on April 18, 1871 (R. 30–31). On May 28, 1932, she established an inter vivos trust, sometimes referred to as the "Allen" trust, under the terms of which she retained three-fifths of the income for life, with remainder to two of her children who were also named as beneficiaries of the other two-fifths of the income (R. 6, 8–12, 31; Pet. 15).

The decedent received her share (three-fifths) of the income of the Allen trust until April 5, 1950, when she assigned her entire interest in the trust to her son, Wharton, for a cash consideration of $140,000. This amount was computed on the basis of actuarial tables and rounded for purposes of the sale. The assignment of April 5, 1950, was made after an investigation by her attorneys of the problem of minimizing estate taxes. The decision to have the decedent sell her interest in the trust was made in the fall of 1949 when she was 78 years old, and she executed her last will and testament at or about that time. She had been in poor health for several years and was regularly attended by a nurse. She broke her hip in January, 1950, and was in the hospital when she executed the assignment of April 5, 1950. Prior to this date, the existence of cancer was suspected, and this suspicion was thereafter confirmed. She died of cancer on December 13, 1950, at the age of 79. (R. 6, 23, 29–38, 80, 107–113; Pet. 16.) [2]

The decedent's will was duly probated (R. 113), and the taxpayers-executors filed a federal estate tax return for her estate (R. 37). They did not include therein any part of the assets of the Allen trust. The Commissioner determined that the sum of $792,290.21 should be so included, representing three-fifths of the corpus, valued at $932,290.21, less the $140,000 received by decedent on assignment of her life estate (R. 25; Pet. 16).

[2] Wharton received $53,332.09 from the life estate the decedent assigned to him for $140,000, so that he lost $86,667.91 (R. 34–35, 36; Pet. 15–16).

The district court held that while the transfer of April 5, 1950, was made by the decedent in contemplation of death, it was a bona fide sale for full and adequate consideration and that therefore no part of the trust corpus should be included in the decedent's gross estate (R. 37–38; Pet. 17). Upon appeal by the government, the court of appeals reversed the judgment of the district court and sustained the Commissioner's determination (Pet. 15–19).

ARGUMENT

Since the instant trust was created after March 3, 1931, there is no question but that three-fifths of the corpus would be includible in the decedent's estate under Section 811(*c*)(1)(B) of the 1939 Internal Revenue Code, *supra*, in the absence of the assignment of April 5, 1950. *Helvering* v. *Ballard*, 303 U.S. 297; *Hassett* v. *Welch*, 303 U.S. 303; *Commissioner* v. *Estate of Church*, 335 U.S. 632; Treas. Reg. 105, § 81.18; cf. *Fidelity-Phila. Trust Co.* v. *Smith*, 356 U.S. 274. Moreover, there is no question but that the assignment of April 5, 1950, was made by the decedent in contemplation of death. The district court so concluded (R. 30, 37–38); the taxpayers conceded the correctness of that conclusion in the court of appeals; and it is not contended otherwise here. And see *Allen* v. *Trust Co. of Georgia*, 326 U.S. 630; *United States* v. *Wells*, 283 U.S. 102.

The only question raised in the petition for certiorari and now before this Court is whether the $140,000 consideration that the decedent received on the sale of her life interest was sufficient to exempt the balance of the corpus ($792,290.21) from the

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the complaint.

AMENDED ORDER DENYING PETITION FOR REHEARING

FILED AUGUST 22ND, 1961

This cause came on to be heard on the petition of appellees for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the directions for remand are modified to provide that the judgment is reversed and the case is remanded for further proceedings in conformity with the opinion filed herein.

federal estate tax. In other words, did the $140,000 constitute "adequate and full consideration in money or money's worth" within the meaning of Section 811(c)(1)(A) of the 1939 Code, *supra*, relating to transfers in contemplation of death? We submit that the court of appeals was clearly correct in holding that it did not. As the court below aptly reasoned (Pet. 17–18):

> It does not seem plausible * * * that Congress intended to allow such an easy avoidance of the taxable incidence befalling reserved life estates. This result would allow a taxpayer to reap the benefits of property for his lifetime and, in contemplation of death, sell only the interest entitling him to the income, thereby removing all of the property which he has enjoyed from his gross estate. Giving the statute a reasonable interpretation, we cannot believe this to be its intendment. It seems certain that in a situation like this, Congress meant the estate to include the corpus of the trust or, in its stead, an amount equal in value. I.e., see Helvering v. Hallock, 309 U.S. 106; C.I.R. v. Wemyss, 324 U.S. 303; C.I.R. v. Estate of Church, 335 U.S. 632.

As we have noted, under Section 811(c)(1)(B) of the 1939 Code, the transferor of property with a retained life estate is regarded for estate tax purposes as the owner of the entire property until his death and its disposition as through his estate. And property transferred in contemplation of death is in the same category as it would have been if the transfer had not been made and the transferred property had continued to be owned by the decedent up to

the time of his death. *Igleheart* v. *Commissioner,* 77 F. 2d 704, 711 (C.A. 5); *Humphrey's Estate* v. *Commissioner,* 162 F. 2d 1, 2 (C.A. 5), certiorari denied, 332 U.S. 817. Plainly, then, where the reservation of a life interest has made transferred property taxable to the estate of the decedent, he cannot render that property nontaxable by the simple expedient of renouncing the life interest in contemplation of death. Rev. Rul. 56–324, 1956–2 Cum. Bull. 999; Treas. Reg. § 20.2035–1(b) (1954 Code); see *Heller* v. *District of Columbia,* 198 F. 2d 983 (C.A. D.C.) (construing comparable provisions in D.C. inheritance tax); *Estate of Thurston,* 36 Cal. 2d 207, 223 P. 2d 12 (construing comparable provisions in California inheritance tax); see also Lowndes, *Cutting the "Strings" on Inter Vivos Transfers in Contemplation of Death,* 43 Minn. L. Rev. 57, 64–65 (1958). By the same token, it would be contrary to the congressional purpose in enacting these provisions to permit the decedent to accomplish essentially the same result by disposing of the life interest for a consideration inadequate to replace the property that had been in the estate by virtue of the reservation of the life interest. See *id.* at 68. Such a rule would permit a taxpayer utterly to defeat the retained life estate provisions, which Congress has diligently endeavored to sustain and preserve, see *Commissioner* v. *Estate of Church,* 335 U.S. 632, 639–640, simply by selling his retained life interest for a negligible amount on his death bed.

The court below was thus clearly correct in holding that where, as here, a retained life interest is sold in contemplation of death, the test of the adequacy of

consideration must necessarily be whether it compensates for the property taken out of the taxable estate and thus prevents the depletion of the estate from the standpoint of estate taxation. Lowndes, *op. cit., supra,* at 70–71; *Estate of Thurston, supra,* 36 Cal. 2d at 215, 223 P. 2d at 17.[3] Petitioner's contention, rejected by the court below, that consideration is adequate if it compensates the decedent for the interest transferred (as opposed to compensating the taxable estate for the property removed from it) deserves the same fate as a similar contention rejected by this Court in *Commissioner* v. *Wemyss,* 324 U.S. 303, 307–308, a gift tax case:

> The section taxing as gifts transfers that are not made for "adequate and full [money] consideration" aims to reach those transfers which are withdrawn from the donor's estate. To allow detriment to the donee to satisfy the requirement of "adequate and full consideration"

[3] In the *Thurston* case, the court, speaking of comparable provisions of state law, said:

> A tax measured by the value of the entire corpus transferred cannot be avoided by the payment of a consideration equal to the value of the interest relinquished. Under section 13644, retention of the life estate is treated as equivalent to the ownership of the entire corpus; its relinquishment of adequate consideration is designed "to prevent a testamentary disposition of the entire corpus. The requirement of adequate consideration is designed "to prevent a man from diminishing his taxable estate by creating obligations not meant correspondingly to increase it, but intended as gifts or a means of distributing it after his death." (*Commissioner* v. *Porter,* 92 F. 2d 426, 428.) It follows that a transfer in contemplation of death that reduces the transferor's taxable estate is not supported by adequate consideration within the meaning of the tax statutes. (*Phillips* v. *Gnichtel,* 27 F. 2d 662, 665; *Latty* v. *Commissioner,* 62 F. 2d 952, 954; see 37 Cal. L. Rev. 134, 141–142.)

would violate the purpose of the statute and open wide the door for evasion of the gift tax. "[T]here is little doubt," as Lowndes and Kramer point out in their treatise, *Federal Estate and Gift Taxes,* 312 (1956), "but that the principle of the [*Wemyss*] case is equally applicable to the estate tax."

There is no merit to petitioners' contention (Pet. 5–8) that the decision below is in conflict with *Sullivan's Estate* v. *Commissioner,* 175 F. 2d 657 (C.A. 9). The decedent in that case owned some property jointly with his wife (all of which would have gone into his estate under Section 811(e) of the 1939 Code), and, in contemplation of his death, he and his wife each conveyed their respective interests in one-half of the property to the other, thus terminating the joint tenancy and creating a tenancy in common. The court's holding there, that the wife's transfer of her interest to the decedent was adequate consideration for the decedent's reciprocal transfer, is not in conflict with the decision below. In the first place, since the decedent's interest in the joint property was always limited by his co-owner's right to the use and enjoyment of a one-half interest in the property, it is not inappropriate to recognize this limitation in evaluating the transfer of his interest; by contrast, in the retained life estate situation, the decedent retains during his life the full enjoyment of the entire property underlying the life estate.

Moreover, the joint property situation does not raise the sort of tax-avoidance possibilities that are presented in the case of a retained life estate. In *Sullivan,* one-half of the property involved would be taxed as part of the husband's estate, and, since there was a conversion to a tenancy in common, the other half

would fall into the estate of the wife when she dies; but in a retained life estate case like the present one, if only the consideration for what little remains of the life interest is subject to estate tax, the balance of the property underlying the life interest will have escaped the estate tax. In recognition of such distinctions, while the Commissioner has acquiesced in the *Sullivan* joint-property rule, *Estate of Brockway* v. *Commissioner,* 18 T. C. 488, 1955–2 Cum. Bull. 4, affirmed on other points, 219 F. 2d 400 (C.A. 9th), he has never extended such acquiescence to retained life estates. Thus, where a retained life estate is transferred in contemplation of death, the rulings and Regulations of the Internal Revenue Service hold that the full value of the property is nevertheless includible in the gross estate of the grantor. Treas. Reg. § 20.2035–1(b); Rev. Rul. 56–324, 1956–2 Cum. Bull. 999.

CONCLUSION

The decision below is clearly correct, and it is not in conflict with any other decision. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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